LIBRARY
COURT, U. S.

Supreme Court, U. S.
FILED
NOV 13 1974

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-387

STEPHEN KARLAN,

Petitioner,

v.

CITY OF CINCINNATI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MR. THOMAS A. LUEBBERS
City Solicitor

MR. PAUL J. GORMAN
Municipal Court Prosecutor

MS. DOLORES JECHURA HILDEBRANDT
Assistant Municipal Court Prosecutor

COUNSEL FOR RESPONDENT

222 East Central Parkway
Cincinnati, Ohio 45202
(513) 352-3324

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OPPOSING JURISDICTION	2
MEMORANDUM OF RESPONDENT-APPELLEE SUGGESTING THAT THE CAUSE IS MOOT	2
QUESTIONS PRESENTED	5
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	6
THE QUESTIONS ARE NOT SUBSTANTIAL	8
ARGUMENT FOR DENIAL OF WRIT	10
I. THE SUPREME COURT OF OHIO THROUGH ITS JUDICIAL CONSTRUCTION OF SECTION 901-D4, DISORDERLY CONDUCT, CINCINNATI MUNICIPAL CODE, COMPLIED WITH THE PROSCRIBED MANDATE ENUNCIATED BY THE UNITED STATES SUPREME COURT IN ACCORDANCE WITH THE CONSTITUTIONAL PENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.	10

Page

II. THE SUPREME COURT OF OHIO UPON JUDICIAL REVIEW AND CONSTRUCTION OF SECTION 901-D4, CINCINNATI DISORDERLY CONDUCT ORDINANCE DID NOT CREATE A NEW CRIMINAL SANCTION FOR THAT CLASS OF CONDUCT WAS NEVER AFFORDED CONSTITUTIONAL PROTECTION AND PETITIONER WAS AFFORDED FAIR NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 8

City of Cincinnati v. *Karlan*, 35 Ohio St. 2d 34, remanded United States Supreme Court, April 15, 1974 (No. 73-537); 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974) 8, 10, 11, 13

Coates v. *Cincinnati*, 402 U.S. 611 (1971) 9

Colten v. *Kentucky*, 407 U.S. 104 (1972) 11, 12

Cox v. *Louisiana*, 379 U.S. 536 (1965) 9

Lewis v. *City of New Orleans*, 415 U.S. 130, 39 L. Ed. 2d 214 (1974) 7, 8, 11, 13

Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 9

United States et al. v. *Alaska, S.S. Co., et al.*, 40 S.Ct. 448, 253 U.S. 113 (1920) 4

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-387

STEPHEN KARLAN,

Petitioner,

v.

CITY OF CINCINNATI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Ohio following vacation and remanding by the United States Supreme Court is reported at 39 Ohio St. 2d 107, 314 N.E. 162 (1974) and reproduced in Petitioner-Appellant's brief as Appendix A therein. The first opinion of the Supreme Court of Ohio is reported at 35 Ohio St. 2d 34, 298 N.E. 2d 573 (1973), and reproduced within Petitioner's writ therein as Appendix B. The opinion of the Court of Appeals for the First District Court of Appeals, Hamilton County, Ohio, is unreported and reproduced within Petitioner's writ as Appendix C.

STATEMENT OPPOSING JURISDICTION

Loss of Jurisdiction by Mootness

The Appellee in the above-entitled case respectfully advises the Court of certain facts which in Appellee's view, render this cause moot.

MEMORANDUM OF APPELLEE SUGGESTING THAT THE CAUSE IS MOOT

The questions which Appellant Karlan seeks to raise on this petition for a writ of certiorari are threefold:

I. Whether Section 901-D4, Cincinnati Municipal Code, which provides that it is "unlawful for any person to wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner with the intent to abuse or annoy any person," as written and as applied to speech, is repugnant to the First and Fourteenth Amendments of the Constitution of the United States, as vague and overbroad in its restraint upon the freedom of speech, where the ordinance at the time of the offense had not been judicially interpreted by any Ohio Court to be confined to a narrow and limited class of speech not entitled to constitutional protection.

II. Whether the Supreme Court of Ohio, upon Judicial review and construction of Section 901-D4, Cincinnati Municipal Code, creating a new criminal sanction penalizing speech in the "fighting" category, may apply that judicial interpretation and criminal sanction retroactively against Petitioner in affirming his conviction and sentence without denying to Petitioner his rights under the due process clause of the Fourteenth Amendment of the Constitution of the

United States on the basis that Petitioner was afforded no fair notice at the time of the offense of the subsequent creation of a new criminal sanction.

III. Whether the Supreme Court of Ohio's creation of a new criminal sanction through its judicial construction of Section 901-D4, Cincinnati Municipal Code, to punish speech as a criminal act utterances which inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace, is repugnant to the First and Fourteenth Amendments of the Constitution of the United States as vague and overbroad in its restraint upon the freedom of speech.

These three questions necessarily relate to the existence of Section 901-D4, Disorderly Conduct ordinance of the Cincinnati Municipal Code. This ordinance which is the basis for the action complained of his been effectively *repealed* on December 31, 1973, and is no longer an offense with criminal sanction. (emphasis added)

It is thus apparent that there is no occasion for this Court to pass upon questions which have no relevance. Jurisdiction does not lie with respect to the instant petition presented by Appellant for the reason that said Disorderly Conduct ordinance has been abandoned. The United States Supreme Court has jurisdiction only over actual cases and controversies between adverse interests. The questions presented by Appellant become academic by reason of absence of controversy and effective termination of subject ordinance.

Appellant Karlan has no standing to complain of the abandonment of the ordinance in question and he likewise has no standing to request that this Court issue an advisory opinion on the questions presented. In other

words, the Appellant is now seeking to invoke the jurisdiction of this Court on abstract questions. This he may not do.

The Supreme Court will determine only actual matters in controversy essential to the decision of the particular case before it, and where a subsequent law has come to an end the case becomes moot and will be treated accordingly. *United States et al.* v. *Alaska S. S. Co. et al.*, 40 S. Ct. 448, 253 U.S. 113 (1920). Wherefore jurisdiction falls with the abrogation of the statute upon which it is founded.

For these reasons, Appellee suggests that the issues sought to be raised are moot as to the Appellant Karlan and that the petition for writ of certiorari to the Supreme Court of Ohio should be dismissed on that ground.

QUESTIONS PRESENTED

I.

THE SUPREME COURT OF OHIO THROUGH ITS JUDICIAL CONSTRUCTION OF SECTION 901-D4, DISORDERLY CONDUCT, CINCINNATI MUNICIPAL CODE, COMPLIED WITH THE PROSCRIBED MANDATE ENUNCIATED BY THE UNITED STATES SUPREME COURT IN ACCORDANCE WITH THE CONSTITUTIONAL PENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

II.

THE SUPREME COURT OF OHIO UPON JUDICIAL REVIEW AND CONSTRUCTION OF SECTION 901-D4, CINCINNATI DISORDERLY CONDUCT ORDINANCE DID NOT CREATE A NEW CRIMINAL SANCTION FOR THAT CLASS OF CONDUCT WAS NEVER AFFORDED CONSTITUTIONAL PROTECTION AND PETITIONER WAS AFFORDED FAIR NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the First and Fourteenth Amendments of the Constitution of the United States and Section 901-D4, Disorderly Conduct, Cincinnati Municipal Code, are reproduced and set forth within the Appendix F of petitioner's writ therein.

STATEMENT OF THE CASE

There is no doubt that petitioner Karlan's conduct cannot be effectively separated from the unprotected verbalisms employed by him which constitute the subject of this action. To ignore the facts and circumstances surrounding petitioner's use of unprotected speech would circumvent the purpose of First Amendment rights altogether.

On January 19, 1971, at approximately 5:05 p.m., James Ward and Norman Stewart, two Cincinnati police officers, arrived at the District Three stationhouse and drove into the fenced police lot. This area which is adjacent to the police stationhouse was used as a protective lot for motor vehicles which were in police custody. A signed release is necessary before any car or article therefrom can be removed.

As they approached the protective lot the police officers noticed that a man had the hood of an impounded vehicle open and that there was a radiator in Petitioner's hands. Being cognizant of the fact that many robberies had occurred within said police lot, Officer Ward approached the Petitioner-Appellant to investigate. As the uniformed officer approached the impounded vehicle Petitioner-Appellant spoke first and said "Who are you looking at?"

Officer Ward asked the Petitioner if he had obtained the necessary release from the police district. At this time the officer also explained to instant Petitioner the procedures and purpose necessitating the acquisition of said release and that such a release was a prerequisite to any removal of automobile parts.

It was at this point that Petitioner-Appellant herein yelled, "I hate all of you fucking cops." Because the appellant appeared "wild", Officer Ward attempted to calm him

by once again inquiring whether he had obtained a permissive release. Appellant's response was "Get out of my way you fucking, prick-ass cops." Officer Ward then closed the hood of the vehicle and once more told Petitioner-Appellant that he needed the proper release before he could touch the impounded vehicle. At this time Officer Ward also cautioned him not to use any additional foul language. With this, Appellant called Officer Ward a "prick-assed cop."

It is uncontradicted that Officer Ward again attempted to calm instant Petitioner by cautioning him "not to use any more foul language." Appellant's response was, "Prick-assed cop." After the fourth epithet directed towards him, Officer Ward then explained to the Appellant that he was under arrest.

Petitioner Karlan was on a police secured area. At no time did he possess a release in order to remove parts from an automobile in police custody. Said vehicle *did not* belong to defendant and Karlan *gave no* explanation for removing auto parts from a police lot. (Emphasis)

Subsequently, Petitioner was tried and convicted by a jury of his peers and said convictions was affirmed by the First District Court of Appeals, Hamilton County, Ohio, and thereafter by the Ohio Supreme Court.

This Court vacated the judgment and remanded the case to the Supreme Court of Ohio for further consideration in light of *Lewis* v. *New Orleans* (1974). The Ohio Supreme Court in reconsidering applied and followed the specific mandate enunciated by this Court.

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION HEREIN INVOLVED AND THIS CASE IS NOT OF GREAT OR GENERAL PUBLIC INTEREST.

Clearly, this case does not involve any constitutional question for these exact issues have been previously decided in *Lewis* v. *City of New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974). This case was remanded to the Supreme Court of Ohio for consideration in light of *Lewis*. On remand the Supreme Court of Ohio applied and construed the *Lewis* decision in accordance with this Court's mandate. The Ohio Supreme Court *did* narrow and refine the words of the ordinance and construed it as *not* being susceptible of application to protected speech, although vulgar or offensive. (Emphasis added) *City of Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974)[1].

Unlike the Louisiana Supreme Court in *Lewis*, the Ohio Supreme Court has complied with the constitutional necessity of limiting this type of ordinance to words which;

> "by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942). This principle was again enunciated in *Lewis* v. *New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974), and the Ohio Supreme Court has construed the Cincinnati Disorderly Conduct Ordinance as within the constitutional pronouncements of the United States Supreme Court.

Instant case involves conduct coupled with speech which is clearly within the peripheria of the narrow'y construed

---

[1] The opinion of the recent decision of the Ohio Supreme Court upon remand in light of *Lewis* is reproduced within petitioner Karlan's memorandum therein as Appendix A at 1a.

ordinance and never did fall within that class of constitutionally protected speech and conduct. The right of free speech, while fundamental in our democratic society was not intended by the framers of the Constitution to make a course of conduct unpunishable merely because the conduct was in part initiated by means of language. *Cox* v. *Louisiana*, 379 U.S. 536 (1965)

Wherefore, in construing subject disorderly conduct ordinance the Ohio Supreme Court did not create a retroactive legal rationale but only limited the application of the ordinance to instances where there is no protected right. The decision below turns upon its own facts, and it will affect no one in view of said narrow construction and the abandonment of said ordinance from criminal sanction.

Consequently the now narrowly construed disorderly conduct ordinance clearly provides fair notice of what is prohibited by clear and explicit standards. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971)

The Supreme Court of Ohio has complied with the mandate of this Court and consequently petitioner's questions are moot. Furthermore, this cause lacks importance because the non-existence of said ordinance would affect no one and cannot be regarded as bearing any semblance to a constitutional question.

ARGUMENT FOR DENIAL OF WRIT

I.

THE SUPREME COURT OF OHIO THROUGH ITS JUDICIAL CONSTRUCTION OF SECTION 901-D4, DISORDERLY CONDUCT CINCINNATI MUNICIPAL CODE, COMPLIED WITH THE PROSCRIBED MANDATE ENUNCIATED BY THE UNITED STATES SUPREME COURT IN ACCORDANCE WITH THE CONSTITUTIONAL PENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Cincinnati Disorderly Conduct Ordinance as recently narrowed by the Ohio Supreme Court has been limited to words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974). In finding that petitioner's language constituted "fighting words" the Ohio Supreme Court also construed the ordinance as limited to such words and rendered said ordinance unsusceptible of application to protected speech. The Ohio Supreme Court upon reconsideration stated that:

> "Persons may not be punished under Section 901-D4, Code of Ordinances of Cincinnati, for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words by their very utternance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace."

Cincinnati v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974).

Petitioner's questions are now moot for the Ohio Supreme Court has specifically complied with this Court's mandate and said ordinance cannot be attacked as being repugnant to the First and Fourteenth Amendments of the Constitution of the United States. Speech no matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobious, may not be made a crime unless they are fighting words and unsusceptible of application to protected speech. *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974); *Lewis* v. *New Orleans*, 415 U.S. 130, 39 L. Ed. 2d 214 (1974)

It is emphasized that the facts and issues raised in this cause are identical to those facts and issues already decided by this Court in *Lewis* v. *New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974). In keeping within the guidelines as set forth by this Court in *Lewis* and as applied to this case, it is clear that the conduct and epithets emitted under the set of facts and circumstances now before this Court do not fall within the purview of any constitutionally protected freedom.

Unlike *Lewis*, the case at bar does not involve the mere name calling of another individual. Here, there is no dispute that instant petitioner was removing articles from a vehicle not his own and without police authorization. At no time did Karlan explain his conduct in tampering with police protected property. This case does *not* turn on verbal pronouncements alone. (Emphasis added) [2]

Like *Colten* v. *Kentucky*, 407 U.S. 104 (1972), instant petitioner's conduct and speech was not an exercise within

---

[2] The facts of this case are almost identical to those in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Colten was arrested for disorderly conduct when he failed to comply with a request given by a police officer. Colten verbally expressed discontent with the officer's request and was then arrested.

the purview of any constitutionally protected freedom. Consequently, there is no basis for distinction between the facts at bar from *Colten.*

It is obvious that petitioner Karlan presents no constitutional question to be decided by the United States Supreme Court.

II.

THE SUPREME COURT OF OHIO UPON JUDICIAL REVIEW AND CONSTRUCTION OF SECTION 901-D4, CINCINNATI DISORDERLY CONDUCT ORDINANCE DID NOT CREATE A NEW CRIMINAL SANCTION FOR THAT CLASS OF CONDUCT WAS NEVER AFFORDED CONSTITUTIONAL PROTECTION AND PETITIONER WAS AFFORDED FAIR NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It is crucial to point out that even though the facts of this case involve verbal epithets, petitioner was not convicted upon his verbal expressions. The pertinent portions from the trial court's instructions to the jury are reproduced at page 24a in Appendix G of petitioner's writ.

From these instructions it is obvious that the entire charge to the jury emphasized defendant's conduct and did not rely upon speech[3] At no time during the trial or within

[3] "The final essential element is: Did the defendant wilfully *conduct* himself in such a manner, wilful is defined that the defendant knew what he was doing and voluntarily decided to do it without regard of the law or rights of others. Wilfulness is determined from the manner in which the *act* was performed and from all of the other facts and circumstances in evidence. (emphasis added)

the trial court's charge to the jury was it indicated that said defendant could be found guilty by words alone. This factor is important for even though this Court found that the Cincinnati Disorderly Conduct ordinance must be construed in light of *Lewis*, defendant's conviction did not turn on speech.

Precisely, petitioner Karlan was afforded "fair notice" and no "retroactive" criminal action is being applied to this case. Instant petitioner's conduct in removing auto parts from a vehicle not his own and in police custody does not involve First Amendment rights. Defendant did not have police authorization to tamper with police property and could produce no explanation for his presence on a secured police area. These were the primary factors which led to petitioner Karlan's arrest. The vulgar epithets and "fighting words" were only incidental to this cause.

The Cincinnati Disorderly Conduct Ordinance does not punish only spoken words as did the ordinance in *Lewis* v. *City of New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974), and is therefore clearly distinguishable from this cause. Subject ordinance withstands petitioner's attack for as authoritatively construed by the Ohio Supreme Court in *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974), it is not susceptible of application to protected speech. The importance of speech in relation to the exposition of ideas cannot be over-emphasized.

The speech uttered by petitioner Karlan to the arresting officer was clearly "fighting". *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107 (1974). It therefore is within the reach of the ordinance as narrowed by Ohio's highest Court in accordance with *Lewis*. The ordinance, moreover, poses no threat to protected speech.

CONCLUSION

For the reasons set forth above, certiorari should be denied.

Respectfully submitted,

MS. DOLORES JECHURA
HILDEBRANDT

Asst. Municipal Court Prosecutor
City of Cincinnati, Ohio

COUNSEL ON BEHALF OF
RESPONDENT